

BRIEFING BOOK ARTICLE, 47TH PARLIAMENT

War crimes in Afghanistan: the Brereton Report and the Office of the Special Investigator

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Key issue

- ▶ A 2020 report of the Inspector-General of the Australian Defence Force found credible information of war crimes committed by the ADF in Afghanistan between 2005 and 2016.
- ▶ The Office of the Special Investigator (OSI) is investigating these accusations. To date, no individuals have been referred for prosecution.
- ▶ The Taliban's takeover of Afghanistan has created practical difficulties for investigators.
- ▶ Australia has obligations under international law to investigate and prosecute war crimes.

As a result of rumours that surfaced regarding alleged war crimes by Australian Special Forces in Afghanistan, in 2016 the Chief of Army referred the situation to the Inspector-General of the ADF (IGADF) who then directed the Assistant IGADF to inquire into the matter ([Brereton Report](#), p. 10).

The *Inspector-General of the Australian Defence Force Afghanistan Inquiry report*, released in 2020 (the [Brereton Report](#)) found credible information that members of the Australian Special Forces had committed war crimes during their operations in Afghanistan between 2005 and 2016. These accusations led to the establishment of the [Office of the Special Investigator](#) (OSI).

The Brereton Report and the ongoing work of the OSI is significant due to the role of Australia's armed forces overseas, Australia's international reputation and the need to ensure that the ADF is adhering to International Humanitarian Law (IHL).

It is likely that over the course of the 47th Parliament, some of the work of the OSI as well as structural and cultural responses by Defence are likely to come to completion. Parliament will have an ongoing role in monitoring this work, particularly as over time the momentum for change may diminish in the context of other pressing issues.

Australia has obligations under IHL to prosecute grave breaches of the Geneva Conventions. In addition, Australia is a state party to the Rome Statute of the International Criminal Court (ICC) which carries international obligations to investigate and prosecute war crimes.

Currently, the investigations by the OSI are continuing, with a recent injection of funds in the 2022–23 federal Budget (see the [Parliamentary Library's 2022 Budget review article](#) on the OSI), although to date no referrals have been made from the OSI to the Commonwealth Director of Public Prosecutions (CDPP) for prosecution. It is likely, however, that these referrals will be made over time.

When the OSI was established by the Morrison Government, the then Opposition Leader [Anthony Albanese](#) said that Australia 'must act on the Brereton Report findings and never hide from the truth of our past'. Following the release of the Report in November 2020, the then Shadow Defence Minister, Richard Marles, [called on the Morrison Government](#) to implement all the recommendations of the Brereton Report and said that Labor supported the establishment of the OSI.

The Brereton Report

On 6 November 2020 the Chief of the Defence Force, General Angus Campbell, received the Brereton Report from the [Inspector-General of the ADF](#), James Gaynor. The Inspector-General is an independent statutory office holder, with powers similar to a royal commission ([Brereton Report](#), p. 27). The Afghanistan Inquiry was subsequently conducted by Major General Paul Brereton, a judge of the NSW Supreme Court and Army Reserve Officer, acting in the capacity of an Assistant IGADF. The findings of the Brereton Report were announced on 19 November 2020 and a redacted public version was released.

Australia's military involvement in Afghanistan began in September 2001 and continued until mid-June 2021, making it the longest engagement by Australia in an armed conflict (p. 26). The Brereton Report labels the actions of a number of Australian Special Forces members 'disgraceful and a profound betrayal of the Australian Defence Force's professional standards and expectations' (p. 41).

While the Afghanistan Inquiry did not make final conclusions on whether a criminal or disciplinary offence had been committed by a specific person, it was able to make findings that credible information existed which, if substantiated, could lead to criminal convictions (pp. 146–157). This reflects that it functioned as a fact finding inquiry into the broader issue (see Part 4, Division 4A of the [Inspector-General of the Australian Defence Force Regulation 2016](#)) rather than as a criminal court, which has the task of making a finding of fact in relation to specific criminal charges brought against a named individual. Importantly, in performing its tasks it operates under different rules of evidence, providing different levels of protection to witnesses and the accused. As the report states: 'the purpose was to inform options for further action ... it is the beginning of a process' (p. 27).

The Brereton Report states that credible information existed of 23 incidents in which one or more non-combatants were unlawfully killed by or at the direction of Australian Special Forces, which may constitute the war crime of murder. There was also credible information of a further 2 incidents where a non-combatant was mistreated in a way that may constitute the war crime of cruel treatment' (pp. 28–29). The report found credible information that during these alleged incidents, a total of 39 individuals were killed and a further 2 individuals were treated cruelly. In total, 25 current or former ADF personnel were identified as alleged perpetrators- either as principals or accessories (p. 29).

The Brereton Report states that these acts were not 'incidents of disputable decisions made under pressure in the heat of battle' (p. 29). Rather, they were situations 'in which it was or should have been plain that the person killed was a non-combatant, or *hors-de-combat*' (p. 29). If an individual is *hors-de-combat* this means that they are in the power of an adverse party, they have clearly expressed an intention to surrender or they are defenceless because, for example, they are unconscious or incapacitated. Attacking an individual who is *hors-de-combat* is prohibited under IHL and they must be treated humanely.

The Brereton Report also found that there is credible information that some members of the ADF placed weapons with the body of an 'enemy killed in action'. This was done 'in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target' (p. 29).

The Brereton Report recommended that the Chief of the Defence Force refer 36 matters comprising 23 incidents and 19 individuals to the Australian Federal Police (AFP) for criminal investigation (p. 40). These 19 individuals could face prosecution for war crimes in Australia under the [Criminal Code Act 1995](#) (Cth) Division 268. These crimes could also potentially be prosecuted at the ICC as Australia is a state party to the Rome Statute.

The Brereton Report also recommended that 'consideration be given to administrative action for some serving [ADF] members, where there is credible information of misconduct which either does not meet the threshold for referral for criminal investigation, or is insufficiently grave for referral, but should have some consequence' (p. 41). The Brereton Report also made recommendations to address the broader reasons behind the findings of potential war crimes such as 'strategic, operational, structural, training and cultural factors' that contributed to the alleged crimes indirectly (p. 41).

Government response

In response to the Brereton Report, the Department of Defence said it would deal with disciplinary matters relating to soldiers accused of war crimes and other misconduct in Afghanistan. This was outlined in the [2021 Afghanistan Inquiry reform plan](#).

According to media reports, as a result of the Brereton Report, 17 lower ranked soldiers have been issued termination notices for 'alleged failure to meet ADF expectations and values. The reports suggest that several of these soldiers were dismissed, some continued serving and others were medically discharged. Documents obtained through Freedom of Information requests revealed that General Campbell suspended potential administrative actions against 7 serving and former officers until the OSI investigations concluded.

The Australian Government also established the separate and independent [Afghanistan Inquiry Implementation Oversight Panel](#). The Oversight Panel is intended to provide independent oversight and assurance of the Department of Defence's broader response to the Afghanistan Inquiry. In undertaking its work, the Oversight Panel reports quarterly to the Minister for Defence (p. 15).

Victims of war crimes committed in Afghanistan

The Brereton Report recommended that where 'there is credible information that an identified or identifiable Afghan national has been unlawfully killed', Australia should compensate the family of the individual without waiting for the establishment of criminal liability. This will be an important step in rehabilitating Australia's international reputation, in particular with Afghanistan, and it is simply the right thing to do' (p. 41).

In the [2021 Afghanistan Inquiry reform plan](#) the Government committed to developing a whole-of-government response to the recommendations to compensate families of victims of war crimes by the end of 2021. In April 2022, the Department of Defence confirmed that this response had yet to be finalised and that the department 'was still consulting with a range of government agencies regarding the compensation recommendations'.

Office of the Special Investigator

On 12 November 2020 the Morrison Government announced it would establish the Office of the Special Investigator (OSI), with the task of reviewing the findings of the Brereton Report. In doing so the OSI is working with the AFP to investigate allegations of war crimes committed by the ADF in Afghanistan from 2005 to 2016. The investigations are being conducted as part of a joint OSI- AFP investigation model and each team has at least one AFP investigator ([OSI 2020-21 Annual report](#), p. 10).

The OSI is also developing briefs of evidence with respect to offences that are established under Australian law, for referral to the CDPP.

On December 2020 an [Executive Council Order](#) was approved by the Governor-General to establish the OSI as an Executive Agency under section 65 of the [Public Service Act 1999](#). The OSI was formally established on 4 January 2021 and sits within the [Home Affairs portfolio](#).

On announcing the establishment of the OSI, Prime Minister Morrison said: 'We need to ensure justice is truly served by illuminating the conduct of those who may have acted in ways that do not accord with the high standards expected of our ADF'.

At Senate Estimates in May 2021, Director-General of the OSI, Chris Moraitis stated that the OSI, in cooperation with the AFP, was investigating not just the potential criminal matters raised in the Brereton Report but also any new allegations of criminal offences by the ADF from 2005 to 2016 in Afghanistan (p. 114). At Senate Estimates in October 2021, he said that the OSI has not exonerated any of the 19 individuals implicated and the investigations process could take up to 5 years to conclude (p. 55).

At the same Senate Estimates hearing on 25 October 2021, Mr Moraitis said that the joint OSI- AFP investigations were underway with more than 50 investigators and intelligence analysts, including 10 teams of investigators (p. 54).

The fall of Kabul to the Taliban in August 2021 has created practical difficulties for the collection of evidence in Afghanistan. According to Mr Moraitis, 'To date, our work has not been markedly impeded by the situation in Afghanistan' (p. 54). He indicated that investigations could continue as investigating teams were focused on gaining information from a variety of other sources aside from on the ground in Afghanistan. However, 'the situation is not ideal from an investigation perspective ... access to individuals in Afghanistan or even evidence or places is extremely difficult, if not currently impossible' (p. 55).

Similarly at Senate Additional Estimates hearings on 14 February 2022, Mr Moraitis indicated that: 'it's not ideal in the sense that you can't visit the country and pursue avenues there. It just means that we need to focus on what we can do, rather than what we can't do' (p. 129). He reiterated that the OSI was focused on gathering evidence outside Afghanistan as well as from inside Afghanistan, without physically being present (p. 129).

A key risk is that ultimately the OSI investigations may not result in charges being brought due to the difficulties in obtaining evidence and the extended period of time since the alleged offences occurred.

Wider context: the International Criminal Court

Australia's response to the allegations made in relation to the ADF in Afghanistan should also be viewed in the wider context of the international legal framework.

The world's first permanent international criminal court, the ICC, was established pursuant to the Rome Statute in 1998 and Australia is a state party.

As noted, under the Rome Statute, states parties have a duty to investigate and appropriately prosecute suspected perpetrators of international crimes. The ICC has an obligation to prosecute international crimes within its jurisdiction only if a state with jurisdiction is 'unwilling or unable' to prosecute ([Article 17\(1\)\(a\)](#)). This is known as the principle of complementarity.

Case study: Iraq/UK and the ICC

The ICC undertook a preliminary examination into the Iraq/UK situation that focused on crimes allegedly committed by UK nationals in the Iraq conflict between 2003 and 2008. The Office of the Prosecutor noted that the preliminary examination found 'a reasonable basis to believe that members of UK armed forces committed war crimes within the jurisdiction of the Court against persons in their custody' (p. 4).

However, the Office of the Prosecutor found that the UK was not unwilling to carry out relevant investigative inquiries or prosecutions in accordance with Article 17(1)(a) of the Rome Statute. Where there were decisions by the UK not to carry out prosecutions in specific cases this did not result from a genuine unwillingness to prosecute ([Article 17\(1\)\(b\)](#)). Therefore, the preliminary examination was closed on 9 December 2020 without seeking authorisation to open an investigation (p. 4).

The ICC is currently undertaking an investigation into international crimes committed in Afghanistan since 1 May 2003, including alleged crimes related to the conflict in Afghanistan that were committed on the territory of other states parties to the Rome Statute since 1 July 2002. This investigation was authorised by the Appeals Chamber of the ICC on 5 March 2020.

In 2020, Afghanistan requested that the investigation into Afghanistan be deferred so that the state could conduct national proceedings. The ability of Afghanistan to do so has, however, been questioned by human rights organisations. In September 2021 the ICC prosecutor requested that the investigation be resumed.

The inquiry into allegations of Australian war crimes in Afghanistan may increase the possibility of further inquiries and investigations into the actions of the ADF operating in other countries, such as Iraq. In both New Zealand and the UK, the actions of military forces operating in these overseas military operations has been questioned due to allegations of war crimes.

Further reading

Inspector-General of the Australian Defence Force (IGADF), [Afghanistan Inquiry Report](#), (Canberra: IGADF, 2020).

Nicole Brangwin, [Background to the Afghanistan Withdrawal: a Quick Guide](#), Research paper series, 2021–22, (Canberra: Parliamentary Library, 2021).

Karen Elphick, [Reports, Allegations and Inquiries into Serious Misconduct by Australian Troops in Afghanistan 2005–2013](#), Research paper series, 2020–2021, (Canberra: Parliamentary Library, 2020).

Karen Elphick, [The Inspector-General of the Australian Defence Force Afghanistan Inquiry \(Brereton Inquiry\): a Quick Guide](#), Research paper series, 2020–2021, (Canberra: Parliamentary Library, 2020).

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